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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

McKINLEY SIMPSON,

Defendant and Appellant.

Case No. 7715

BRIEF OF RESPONDENT

FILED

SEP 11 1931

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In the Supreme Court of the State of Utah

STATE OF UTAH,

Plaintiff and Respondent,

vs.

McKINLEY SIMPSON,

Defendant and Appellant.

Case No. 7715

BRIEF OF RESPONDENT

STATEMENT OF FACTS

Appellant makes no statement of facts in his brief. Consequently respondent deems it advisable to set forth the following statement of facts as shown in the record.

On January 28, 1951, during the nighttime, the defendant McKinley Simpson accompanied by James Nixon, Robert Clewis and Paul Perkins drove in Clewis' car to the Brewer Tire Company located on 1st South and 1st West in Salt Lake

City, Utah. Defendant and Perkins broke into and entered the tire company by forcing open the back door and breaking a small window in the back of the building. They took ten (10) tires, loaded them into the car and drove to Pete Migliacco's Tavern, located at 363 West South Temple, where defendant attempted to sell the tires to Mr. Migliacco (Tr. 45, 46, 52, 53, 54, 55, 76, 79, 80, 81, 105, 106, 110 and 111). They also attempted to sell these tires to Henry Oliver the same night (Tr. 69, 98).

Later the same night Paul Perkins and defendant returned to the Brewer Tire Company where they again entered the tire company to steal more tires (Tr. 56-84). This burglary was interfered with by the arrival of Special Officers Haskell Merrick and Jack Merrick (Tr. 56). The defendant and Perkins then ran out the back door, through an alley north, then west to 1st West, north on 1st West to the north side of South Temple, leaving a clear trail of footprints in the snow (Tr. 57, 81, 84 and 87). Defendant and Perkins ran into an alley parallel with South Temple proceeding east, turning south and coming out on South Temple where they sought to conceal themselves in the Utah Apartments (Tr. 57, 84, 85, 87, 88, 90, 107, 112, 115, 116, 117.)

Police Officers Jack Merrick and Wilbur Anderson followed the two sets of fresh footprints in the snow from the rear door of the Brewer Tire Company, north then west to 1st West, north on 1st West to South Temple, north across South Temple and into an alley running east parallel to South Temple, then south to South Temple to the Utah Apartments where

Officer Jack Merrick arrested the defendant and Perkins (Tr. 82, 84, 85, 86, 87, 88, 89, 90 and 91).

The day following defendant's arrest, codefendant Nixon sold four (4) of these tires to Henry Oliver. The day following the sale to Henry Oliver, codefendant Nixon recovered the tires he had sold to "stache" them in an attempt to prevent detection because of the arrest of Perkins and the defendant (Tr. 68, 69, 70, 71). These tires were recovered by Police Officers D. F. Duncombe and Wilbur Anderson with the aid of Henry Oliver (Tr. 47, 58, 94, 70, and 95).

The defendant was convicted of second degree burglary in the District Court of Salt Lake County, Utah, from which conviction he appeals.

STATEMENT OF POINTS

I. THE COURT DID NOT COMMIT ERROR BY RECEIVING IN EVIDENCE STATEMENTS MADE BY A CODEFENDANT OR ACCOMPLICE, OUT OF THE PRESENCE OF THE DEFENDANT THEN ON TRIAL.

II. THE DEFENDANT WAS NOT CONVICTED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE; THEREFORE THE COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S REQUEST FOR A DIRECTED VERDICT.

III. THE COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY TO VIEW THE TESTIMONY OF AN ACCOMPLICE WITH CAUTION.

ARGUMENT

POINT I

THE COURT DID NOT COMMIT ERROR BY RECEIVING IN EVIDENCE STATEMENTS MADE BY A CODEFENDANT OR ACCOMPLICE, OUT OF THE PRESENCE OF THE DEFENDANT THEN ON TRIAL.

Appellant asserts that the trial court erred in admitting the testimony of Henry Oliver as to conversations between himself and James Nixon, an accomplice and codefendant, which took place the day after the alleged act of burglary (Tr. 69, 98). Appellant objected to this testimony on the grounds that the conversation took place after the commission of the crime charged and outside the presence of the defendant then on trial.

Appellant's theory in the instant case is founded on the claim that the crime charged, burglary, was accomplished on the night of January 28th and ended with the arrest of the defendant the same night, and that therefore the testimony of the statements made by the codefendant was not admissible as against the defendant, Simpson.

Respondent submits that, although in accord with the appellant's conception of the general rule that "under the

rules of evidence, declarations of a joint defendant made after the commission of the crime and in reference to it, in the absence of the defendant on trial are not competent," that rule is not applicable to the case at bar.

If it can be shown that a common purpose, conspiracy or design of a criminal enterprise was in existence and pending, and its fulfillment was not accomplished, such statements, acts or declarations of a defendant may be used against a codefendant where such statements were made in the furtherance of the common purpose, conspiracy or design of the criminal undertaking. The trial record clearly reveals that such a conspiracy existed, viz. to burglarize the Brewer Tire Company and to wrongfully gain from the sale of these tires.

There is sufficient proof in the record that the conspiracy existing between the codefendants was a continuing one and that the act of burglary was only a part of the general plan of the conspiracy in its entirety. Therefore, the testimony of the conversations of codefendant Nixon, while given after the perpetration of the primary object of the conspiracy, viz. the burglary of the Brewer Tire Company, was made in the furtherance of the over all conspiracy and common design rather than after the completion of the crime as alleged by the appellant.

The evidence of record reveals that a conspiracy did in fact exist between the four codefendants, and does so without reference to any testimony of an accomplice or codefendant herein concerned.

First there is the act of burglary itself. C. W. Brewer

testified to the manner in which entrance to the tire company was gained by defendant and Perkins. He testified also to the number and kind of tires stolen and identified them at the trial as exhibits A and B (Tr. 44-50). Further evidence of the breaking and entering was furnished by the testimony of Special Officer Haskell Merrick (Tr. 79, 80, 81).

Defendant and codefendants, Clewis, Nixon, Perkins, were all identified and connected with this common plan, scheme, or conspiracy by the testimony of Henry Oliver, Pete Migliacco, and Officers Merrick and Anderson. Henry Oliver testified that Nixon, Clewis and the defendant were together in the car when an attempt was made by them to sell the tires to him (Tr. 69, 98). Pete Migliacco connected defendant with this crime by his testimony as to the two separate occasions when the defendant attempted to sell him the tires. The first time the defendant attempted the sale alone and the second time Mr. Migliacco testified that the defendant was not alone (Tr. 74 and 75). Officers Jack Merrick and Anderson connected defendant and Perkins with this conspiracy. Both officers testified as to tracing the two sets of footprints in the snow from the rear door of the Brewer Tire Company directly to where these officers arrested the defendant and Perkins (Tr. 84, 85, 87, 88, 90, 91).

Pete Migliacco's testimony that defendant approached him on two different occasions during the night of the alleged crime, once before the established time of the actual act of burglary and once after the established time of the actual act of burglary, strongly if not conclusively points out that a common plan, scheme, or conspiracy existed at that time between the code-

fendants to burglarize the tire company and to sell the stolen tires for wrongful gain (Tr. 67, 98). Mr. Brewer also testified that the Brewer Tire Company is the exclusive dealer of the particular type of tires identified as Exhibits A and B; that such white wall tires were scarce at the time, that a shipment of such tires had been received about 36 hours prior to the burglary and that none of this type of tire had been distributed by the company out of that shipment. Also Mr. Brewer identified the tires presented in court as the type and kind stolen from his establishment. Police Officers Duncombe and Anderson identified these tires and testified as to their recovery, with the assistance of Henry Oliver (Tr. 47, 48, 70, 94 and 95).

Respondent submits that the above testimony conclusively establishes the existence of a continuing design, plan or conspiracy between the four codefendants to burglarize the tire company and to sell the tires for wrongful gain.

The testimony of Henry Oliver, to which objections were made by counsel for appellant and the admission of which appellant alleges was in error is set out on pages 66 to 71 of the transcript. Oliver testified that Nixon awakened him on the night of the alleged crime and stated that the defendant wanted to see him in the car; there, with Clewis and Nixon, defendant attempted to sell him tires. The following day Nixon sold four (4) tires to him. The day following the sale Nixon recovered the tires from him to "stache" or conceal them to prevent detection because the defendant and Perkins had been arrested.

In the case of *State v. Hill*, 352 Mo.. 895, 179 SW 2d 712,

where the defendant had been convicted of the crime of embezzlement the court held:

" * * * the state (may) introduce evidence of statements made by a participant in crime against another if the statements were made in furtherance of a conspiracy. The fact that the alleged statements were made after the crime had been perpetrated does not necessarily render the statements inadmissible. * * * In *State v. Priesmeyer*, 327 Mo. 335, 37 SW 2d 425, loc. cit. 427, this court commented as follows:

"If a conspiracy continues for any purpose such as disposing of the loot, the effecting of an escape, the concealing of the crime, the admissions of one conspirator would be admissible against another."

The fact that a conspirator was under arrest at the time the statements were made is not always conclusive against the admissibility of the statements in evidence. However, statements of one conspirator cannot be used as evidence against another unless they were made in furtherance of the conspiracy. See 22 CJS Criminal Law, Sections 768, 772, 774, 777, Pages 1309-1320 incl.

In *People v. Lorraine*, 90 Cal. App. 317, 265 P 893, where the defendant was convicted of the crime of grand larceny, the court held:

" * * * The rule relating to the admissibility of the acts and declarations of coconspirators is well settled, and is to the effect that, where an unlawful enterprise between two or more persons, either by direct or circumstantial evidence, every act or declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against

each of them, and that every one who thus enters into a common purpose or design is generally deemed in law a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design. * * *

The common design of a criminal enterprise may extend, however, as appellant concedes, beyond the point of the commission of the act constituting the crime for which the alleged conspirator is on trial. (*People v. Opie*, 123 Cal. 294, 55 P. 989; *People v. Mazurco*, 49 Cal. App. 275, 193 P. 164; *People v. Holmes*, 118 Cal. 444, 50 P. 675; *People v. Rodley*, 131 Cal. 240, 63 P. 351); and, as declared in California Jurisprudence, vol. 5, p. 523. * * *

In other words, whether or not the subsequent act committed is the ordinary and probable effect of the common design or whether it is a "fresh and independent product of the mind of one of the conspirators, outside of, or foreign to, the common design, is a question of fact for the jury * * *, and if there be any evidence to support the finding of the jury on this question, its determination is conclusive."

In the case of *People v. Suter*, 43 Cal. App. 2d 444, 111 Pac. 2d 23, the court held:

" * * * It has been held that the common design of a criminal enterprise may extend in point of time beyond the actual commission of the act constituting the crime for which the accused is being tried, such as for the purpose of concealing the crime, securing the proceeds thereof, sharing or dividing the proceeds of the crime or bribing or influencing witnesses, and consequently evidence is admissible to prove acts committed after the perpetration of the crime for which

the accused is on trial. Of course, it must reasonably appear that such acts were committed in the furtherance of the common design of the conspiracy. It must also be remembered that the question when the design is accomplished, abandoned or frustrated, and whether the acts proved are a part of the design of the conspiracy are for the jury to determine from the facts and circumstances of each case and the nature and purpose of the conspiracy. See *Thompson v. State*, 58 Ga. App. 593, 199 SE 568; and *People v. Ross*, 46 Cal. App. 2 385, 116 P 2d 81.

In *State v. Erwin*, 101 Utah 305, 120 Pac. 2d 285, the court held:

The acts done by the conspirators in order to escape the consequences thereof, even though they at the time know that the conspiracy cannot continue, are nevertheless acts done in the furtherance of the conspiracy. The fact that this act was done after the time limit placed in the indictment does not make it inadmissible as long as it was in furtherance of the conspiracy. See also *State v. Scott*, 111 Utah 9, 175 Pac. 2d 1016, and *State v. Inlow*, 44 Utah 450, 141 Pac. 530.

Respondent submits that the actions and conversations of Nixon on January 29th, as testified to by Oliver, a common design, plan or conspiracy having been proven by other testimony, reveals clearly that his actions were in furtherance of the overall general plan of the existing conspiracy. Under the above authorities, the testimony given by Oliver about Nixon recovering the tires from him after the sale to "stache" or conceal them from the police to prevent detection, after defendant and Perkins were arrested, was admissible as against defendant then on trial (Tr. 70, 71).

A review of the record in this case indicates that the ob-

ject of the unlawful scheme, enterprise or conspiracy was not only to secure the tires from the Brewer Tire Company but also to thereby gain from the sale of these illegally obtained tires. There being ample proof of the existence of a continuing plan or conspiracy, the evidence of acts and declarations occurring after the accomplishment of the primary object, viz, the burglary of the Brewer Tire Company, is here admissible as being in furtherance of the general plan or conspiracy in its entirety. It was not prejudicial error to admit that evidence.

II

THE DEFENDANT WAS NOT CONVICTED SOLELY UPON THE UNCORROBORATED TESTIMONY OF AN ACCOMPLICE; THEREFORE THE COURT COMMITTED NO ERROR IN DENYING DEFENDANT'S REQUEST FOR A DIRECTED VERDICT.

Section 105-32-18, Utah Code Annotated 1943, is cited by appellant as constituting the main basis for appeal and reads as follows:

A conviction shall not be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself and without the aid of the testimony of the accomplice tends to connect the defendant with the commission of the offense and the corroboration shall not be sufficient, if it merely shows the commission of the offense or the circumstances thereof.

It is respondent's contention that the evidence at the trial sufficiently corroborates the testimony of the accomplice. In the case of *State v. Erwin*, supra., this court held:

This Court has held this corroboration need not go to all the material facts testified to by the accomplice (State v. Stewart, 57 Ut. 224, 193 P 855); that the corroborative evidence need not be sufficient in itself to support a conviction; it may be slight and entitled to little consideration. People v. Lee, 2 Utah 441; State v. Spender, 15 Utah 149, 49 P 302. * * *

On the other hand, the corroborating evidence must implicate the defendant in the offense and be consistent with his guilt and inconsistent with his innocence, and must do more than cast a grave suspicion on him, and all of this must be without the aid of the testimony of the accomplice. State v. Lay, 38 Utah 143, 110 P 986; State v. Butterfield, 70 Utah 529, 261 P 804; State v. Park, 44 Utah 360, 140 P 768; State v. Kimball, 45 Utah 443, 146 P 313; State v. Powell, 45 Utah 19 193, 143 P 588; State v. Bridwell, 48 Utah 97, 158 P 710; State v. Baum, 47 Utah 7, 151 P. 518; State v. Frisby, 49 Utah 227, 162 P 616; State v. Elmer, 49 Utah 6, 161 P 167; State v. Gardner, 83 Utah 145, 27 P 2d 51.

The corroborative evidence of an accomplice, unlike proof of corpus delicti, may consist in the admissions of the accused. * * *

See Wharton on Criminal Evidence, 11th Edition, Volume 2, Section 752, 753, 748, 746 and 754, pages 1257 to 1273 inclusive.

See also 25 ALR 886; 87 ALR 767; *State v. Wade*, 66 Utah 276, 241 Pac. 808; *State v. Laris*, 78 Utah 183, 2 P 2d 242; *State v. Caroles*, 74 Utah 94, 277 Pac. 203; *State v. Cox*, 74 Utah 149, 277 Pac. 972; *People v. Derenzo*, 46 Cal. App. 2d 114, 115 P 2d 858; and *People v. Negra*, 208 Cal. 64, 280 Pac. 354.

The record, entirely aside from the testimony of the accomplice, amply connects defendant with the crime and corroborates that testimony. The record establishes that twice during the night of January 28th the defendant went to Pete's Tavern, once alone and once with the codefendants, to obtain a buyer for the stolen tires (Tr. 74, 75, 105, 106 and 110). Both times the defendant displayed knowledge of where the tires were to come from and the same tires were later identified as those stolen from the Brewer Tire Company (Tr. 47, 48, 49, 93 and 94). The possession of the stolen tires and defendant's assertion of ownership certainly are sufficient to establish the defendant's participation and connection with this offense. In *Yeargin v. State*, 54 Okla. Cr. 34, 14 P 2d 431, the court held:

Where an accused person is found in possession of property taken from a place recently burglarized, that fact may be considered by the jury, along with all other circumstances, as tending to show that the one in possession committed the burglary.

See also *Robinson v. State*, 67 Okla. Cr. Rep. 8, P 2d 1082, and *State v. Butterfield*, 70 Utah 529, 261 Pac. 804; and *State v. Morris*, 70 Utah 533, 262 Pac. 107.

Police Officers Merrick and Anderson were able to follow two clear sets of footprints in the snow from the rear door of the Brewer Tire Company directly to where Defendant and Paul Perkins were arrested (Tr. 82, 84, 85, 86, 87, 88, 89, 90, 91).

Defendant in his own testimony admitted running from the officers to avoid arrest. Defendant also admitted going into

the Utah Apartments on South Temple to avoid arrest, where he attempted to conceal himself (Tr. 107, 114, 115, 116, 117).

The record also shows that during the course of defendant's flight and attempted concealment he was observed with Paul Perkins by Officer Anderson who was following the footprints (Tr. 87 and 88).

Flight and concealment of defendant immediately after a crime has been committed is corroborative evidence of guilt. See 25 ALR 886, and Wharton on Criminal Evidence, Section 748.

Defendant was not convicted upon the uncorroborated testimony of an accomplice. His own testimony and the testimony of the police officers and others amply connect him with the crime and fully corroborate Perkins' testimony.

POINT III

THE COURT DID NOT COMMIT ERROR IN REFUSING TO INSTRUCT THE JURY TO VIEW THE TESTIMONY OF AN ACCOMPLICE WITH CAUTION.

Appellant contends that the court committed error in refusing his request for a cautionary instruction in regards to the testimony of an accomplice. Respondent submits that while such an instruction would have been proper, the trial court did not err in refusing such request especially where the subject had been amply covered by other instructions.

Generally as to instructions of this type see Blashfield, on Instructions to Juries, Section 219, Page 487, which states:

While the cases are all agreed that it is a better practice to give the jury a caution of this nature, it is nevertheless held by the majority of decisions that it is merely "a rule of practice, and not a rule of law," and therefore a failure of the judge to give such an instruction of his own motion, or even a refusal to do so on request, is not erroneous, or, if erroneous, is not a ground for reversal.

Jones, on Evidence, 2d Edition, Volume 5, Section 2217, page 4233, states:

Although it might ordinarily be regarded as an omission of duty for the judge to neglect so to instruct the jury, the decisions are to the effect that his refusal so to do is not reversible error, as the matter lies in the discretion of the judge. * * *

There are numerous authorities and cases which point out that the court does not err in refusing such an instruction where the testimony of the accomplice is corroborated by other evidence in the case.

The court in the case at bar gave the jury sixteen (16) written instructions for their consideration and guidance. Respondent contends that the jury was sufficiently informed by these instructions and in effect was cautioned as to the testimony of the accomplice by the instructions of the court Nos. 10, 11, 12, and in particular Instruction No. 9, which reads as follows:

In judging the weight of the testimony and credibility of any witness, you should keep in mind the bias, if any is shown, of such witness, his interest, if any, in the result of the trial, and any probable motive or lack thereof to testify as he does. You may consider his appearance on the witness stand, the reasonableness or lack thereof of his statements, his apparent frankness and candor, or the want of it, his opportunity to know, his ability to understand, his capacity to remember, together with all of the facts and circumstances which have a bearing on the accuracy of his statements. You should also consider any contradictory evidence, and whether or not he contradicted himself, and evidence, if any, pertaining to his character as to truthfulness and honesty, or the lack thereof, and from all the facts and circumstances given in evidence determine what weight and credibility you should give to the testimony of any witness.

Other cases supporting respondent's contention are: *State v. Gross* (1948), 31 Wash. 2d 202, 196 P 2d 297; and *State v. Bixby* (1947), 27 Wash. 2d 144, 177 P 2d 689; *State v. Troiani* (1924), 129 Wash. 228, 224 Pac. 389; *State v. Simpson*, 119 Wash. 653, 206 Pac. 561; and *People v. Rankin* (1944), 64 Cal. App. 2d 956, 153 P 2d 399.

Respondent contends that the evidence sufficiently corroborated the testimony of accomplice Perkins and no error was committed by the court in refusing to give the cautionary instruction requested.

CONCLUSION

In conclusion, it is submitted that the evidence in this case

fully supports the verdict and that the lower court committed no error in refusing to direct the jury to acquit the defendant. The verdict should be sustained.

Respectfully submitted.

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